IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5445

GERALD SHADWICK,

Appellant,

v.

CITY OF TAMPA,

Appellee.

APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF FOR THE APPELLANT

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OPINIONS BELOW

The decision of the Supreme Court of Florida (App. 41) is reported at 250 So.2d 4. That decision affirmed the earlier decision of the District Court of Appeal, Second District of Florida, which is contained in an opinion (App. 32) reported at 237 So.2d 231.

JURISDICTION

The Judgment of the Supreme Court of Florida was entered on June 16, 1971. Appellant did not petition for rehearing in that Court, and on September 1, 1971, filed his Notice of Appeal in the Supreme Court of Florida, the Court of Appeal for the Second District of Florida and the Circuit Court for Hillsborough County, Florida, because each of those three Courts were possessed of a different portion of the record on appeal in the cause. The appeal was docketed in this Court together with appellant's application to proceed in forma pauperis on September 13, 1971, and on January 10, 1972, this Court granted appellant's application to proceed in forma pauperis and noted probable jurisdiction. The jurisdiction of this Court is grounded under 28 U.S.C. 1257(2).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment 4

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution, Amendment 14

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

FLORIDA STATUTES INVOLVED

This appeal, and the proceedings in each of the Courts below, involve the validity of the following statutes of the State of Florida:

1. Florida Statute (1967) Section 168.04, F.S.A., which reads as follows:

> CLERK AND MARSHAL MAY TAKE AFFIDAVITS AND ISSUE WARRANTS
>
> The clerk may administer an oath to and take affidavit of any person charging another with an offense by breach of an ordinance, and may issue a warrant to the marshal to have the accused person arrested and brought before the mayor for trial. The marshal may, in the absence of the mayor and clerk from the police station, administer oaths to affidavits of complaints and issue warrants for the arrest of persons complained against.

2. Section 495 of the Charter of the City of Tampa enacted by the legislature of the State of Florida in Section 17, Chapter 5363, Laws of Florida, 1903, which reads as follows:

> ARREST WITH AND WITHOUT WARRANT
>
> The Chief of Police, or any policeman of the City of Tampa, may arrest, without warrant, any person violating any of the ordinances of said city, committed in the presence of such officer, and when knowledge of the violation of any ordinance of said city shall come to said chief of police or policeman, not committed in his presence, he shall at once make affidavit, before the judge or clerk of the municipal court, against the person charged with such violation, whereupon said judge or clerk shall issue a warrant for the arrest of such person.

3. Section 160.1 of the Charter of the City of Tampa enacted by the legislature of the State of Florida in Section 1, Chapter 61-2915, Laws of Florida, 1961, which reads as follows:

APPOINTMENT OF DEPUTIES; POWERS

The city clerk of the City of Tampa, with the approval of the mayor, may appoint one or more deputies, such deputy or deputies to be selected from the approved classified list of the city civil service, and to have and exercise the same powers as the city clerk himself, including but not limited to the issuance of warrants. One or more of such deputies may be designated as clerks of the municipal court.

QUESTION PRESENTED

Whether special and general statutes of the State of Florida which authorize clerks of court to issue arrest warrants, and impliedly therewith, to determine the existence of probable cause for arrest, upon receiving a sworn affidavit charging the commission of an offense in conclusionary terms, conform with the requirements of the Fourth and Fourteenth Amendments to the United States Constitution, proscribing the issuance of such warrants unless issued by a judicial officer supplied with sufficient information to support an independent judgment that probable cause exists for such warrants.

STATEMENT OF THE CASE

On March 6, 1969, Corporal W. H. Larder of the City of Tampa Police Department, appeared before Nelson P. Gullo, a deputy clerk of the City of Tampa, and executed an affidavit for a warrant for the arrest of the appellant (App. 6).

Upon receiving the affidavit, the deputy clerk thereupon issued a warrant for the arrest of the appellant (App. 7).

The appellant was arrested under authority of that warrant and moved the Municipal Court to quash the warrant because it was issued by a non-judicial officer (App. 8). Appellant's motion was denied (App. 10) and he thereupon initiated proceedings under Florida Law in the Circuit

Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, seeking a Writ of Common Law Certiorari and contesting the constitutionality of the Florida Statutes previously quoted under the due process clause of the Fourteenth Amendment to the United States Constitution (App. 3). The Circuit Court denied relief, (App. 11) and on appeal, the District Court of Appeal, Second District of Florida, affirmed with an opinion (App. 32) reported in 237 So.2d 231, in which that Court held that neither the State nor Federal Constitution requires that the determination of probable cause necessary for the issuance of arrest warrants be made by a judicial officer, and that the city clerk was sufficiently neutral and disinterested to fulfill the role of the neutral person whom the Constitution requires to be placed between the police and the public. Appellant's petition for a rehearing (App. 36) in that Court was denied (App. 39) and he thereupon appealed the decision of that Court to the Supreme Court of Florida which affirmed the District Court of Appeal on June 16, 1971, with the opinion (App. 41) reported in 250 So.2d 4, in which the Supreme Court of Florida held that the clerk and deputy clerks of the Municipal Court of the City of Tampa are neutral and detached "magistrates", unconnected with law enforcement, for the purpose of issuing arrest warrants within the requirements of the Fourth and Fourteenth Amendments of the United States Constitution.

SUMMARY OF ARGUMENT

Statutes which authorize clerks of court to issue arrest warrants and, impliedly, to determine the existence of probable cause for their issuance, facially violate the Fourth and Fourteenth Amendments to the United States Constitution because such a procedure does not insure a deliberate, impartial judgment of an independent judicial officer to assess the weight and credibility of the evidence adduced as probable cause to authorize the resulting invasion of liberty and privacy which such warrants permit. This Court favors resort to a warrant by the police so that an indepen-

dent judicial officer may weigh the facts before them and determine whether an arrest is constitutionally permissible. Such a judgment involves not only the application of complex rules of law to determine the sufficiency of the evidence adduced, but also requires the exercise of sufficient independence and authority to grant or refuse requests for such warrants made by law enforcement officers. That type of independence and authority is possessed only by the judiciary, and its exercise is a judicial function. The practice exhibited by this case undermines the constitutional requirement of an independent determination of probable cause.

ARGUMENT

The Fourth Amendment to the United States Constitution guarantees that no warrant shall issue for the arrest of any person except upon probable cause supported by oath or affirmation measured by the same standards required for the issuance of search warrants. *Whiteley v. Warden of Wyoming State Penitentiary*, 401 U.S. 560 (1971). The same standards applicable to Federal warrants under the Fourth Amendment extend to the several states under the Fourteenth Amendment. *Ker v. California*, 374 U.S. 23 (1963). In a long line of decisions this Court has held that the determination of probable cause requisite to the issuance of such warrants must be made by a neutral and detached magistrate instead of law enforcement officers engaged in the often competitive enterprise of ferreting out crime. *Johnson v. United States*, 333 U.S. 10 (1948); *Coolidge v. New Hampshire*, 403 U.S. 443, 449-453 (1971). For this reason, such probable cause may not be made out by affidavits which are purely conclusory and which do not supply sufficient information to support an independent judgment of the magistrate that probable cause does exist. *Aguilar v. Texas*, 378 U.S. 108 (1964).

This appeal presents to this Court for the first time the question of whether the independent judgment that prob-

able cause exists for the issuance of the warrant required under the Fourth and Fourteenth Amendments may be made by a non-judicial officer, and specifically, whether it may be made by a clerk of court.

In *Whiteley v. Warden of Wyoming State Penitentiary*, 401 U.S. 560, 564 (1971), this Court stated:

> "The decisions of this Court concerning Fourth Amendment probable cause requirements before a warrant for either arrest or search can issue require that the *judicial officer* issuing such a warrant be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant." (Emphasis supplied).

In *Camara v. Municipal Court*, 387 U.S. 523 (1967) this Court quoted from *Johnson v. United States*, 333 U.S. 10, 14 (1948):

> "When the right of privacy must reasonably yield to the right of search, is, as a rule to be decided by a *judicial officer*, not by a policeman or government enforcement agent." (Emphasis supplied.)

In *Wong Sun v. United States*, 371 U.S. 471 (1963) this Court said (at 371 U.S. 481-482):

> "The arrest warrant procedure serves to insure that the deliberate impartial judgment of a *judicial officer* will be interposed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause." (Emphasis supplied.)

On the other hand, this Court used the following language in the 1914 decision it rendered in *Ocampo v. United States*, 234 U.S. 91, 100 (1914):

> "In short, the function of determining that probable cause exists for the arrest of a person accused is only quasi-judicial, and not such that, because of its nature, it must necessarily be confided to a strictly judicial officer or tribunal."

The apparently contradictory language quoted from these decisions must be re-examined in light of the factual situa-

tions involved and questions decided in those cases. *Ocampo* dealt with the validity of an act of the Phillipine Commission authorizing the filing of an information subscribed and sworn to by the prosecuting attorney before the Judge of the Court of First Instance for the City of Manila, who thereupon issued the arrest warrant. The prosecuting attorney was required by that act to conduct a preliminary examination of witnesses under oath and to incorporate in the information a recital that such an investigation had been completed before filing the information. *Whiteley* dealt with an affidavit given by a sheriff containing only his conclusion that the individuals named therein had perpetrated the offense, without specifying the basis for that conclusion. In both cases, the actual warrant was issued by a judge, and not by any clerical personnel. In neither case did the prosecuting attorney or the sheriff base their allegations upon direct personal observations. In *Ocampo*, the Judge of the Court of First Instance was informed only that the prosecuting attorney had examined witnesses under oath, but was not informed of any facts revealed by that examination, although presumably the statutory certification of the information vouched for the credibility of those witnesses. *Whiteley* dealt with the admissibility of evidence obtained as a result of a search made incident to an arrest under the warrant in question, whereas *Ocampo* dealt only with the question of whether a conviction obtained in a criminal prosecution initiated without presentment or indictment by a grand jury violated the Philippine Bill of Rights, which was enacted by Congress. *Whiteley, Camara, Wong Sun* and *Johnson* were decided on constitutional grounds under the Fourth and Fourteenth Amendments, whereas the decision in *Ocampo* expressly stated that the United States Constitution did not of its own force apply to the Philippine Islands. 234 U.S. at 98. This Court has refused to regard its decisions relating to the Philippine Islands—"a territory just recently conquered with long-established legal procedures that were alien to the common law"—as controlling in the interpretation of the United States Constitution. *Green v. United States*, 335 U.S. 184, 197 (1957).

The importance of the question as to who is empowered to make the determination of the existence of probable cause for the issuance of a warrant for arrest is emphasized when it is remembered that this Court has shown a strong preference for resort to a warrant by the police. This Court said in *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932):

> "[T]he informed and deliberate determinations of magistrates empowered to issue warrants . . . are to be preferred over the hurried action of officers . . . who may happen to make arrests."

See also *Jones v. United States*, 362 U.S. 257, 270-71 (1960); *United States v. Ventresca*, 380 U.S. 102, 105-07 (1965); *Whiteley v. Warden of Wyoming State Penitentiary*, 401 U.S. 560, 566 (1971).

In such situations, this Court has held that:

> "[W]hen a search is based upon a magistrate's rather than a police officer's determination of probable cause, the reviewing Courts will accept evidence of a 'less judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant' * * * ." *Aguilar v. Texas*, 378 U.S. 108, 110 (1964).

Likewise, this Court said in *United States v. Ventresca*, 380 U.S. 102, 109 (1965):

> "Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants."

The requirement of a warrant procedure administered by an independent judicial officer is thus both an aid to law enforcement and a protection for the individual.

But if a warrant can be issued by one who is not an independent judicial officer, the premise which justifies upholding arrests and searches on a warrant in doubtful cases disappears. And as in *Jones v. United States, supra*,

362 U.S. at 270, under such a rule, "resort to [warrants] would ultimately be discouraged."

The Florida Supreme Court held that the clerk of the Municipal Court for the City of Tampa was a neutral and detached "magistrate" within the intendment of this Court's decisions because this Court had previously defined the term "magistrate" to include a Notary Public for the purpose of construing the Federal statute governing interstate extradition proceedings in *Compton v. Alabama*, 214 U.S. 1 (1909). However the constitutional question raised in this proceeding was neither raised nor decided in that case; and an examination of that decision reveals that under Georgia law, in effect at that time, notaries public were "ex-officio justices of the peace" who were required to "keep separate dockets of all civil and criminal *cases* disposed of by them" (emphasis supplied). Accordingly Georgia's requisition to Alabama, supported by an affidavit sworn to before a Notary Public, sufficiently complied with the Federal statutory requirement that such a requisition be supported by "an indictment found or an affidavit made before a magistrate." It is apparent that the function of the "magistrate" in that type of proceeding does not include the determination of probable cause required to insure protection under the Fourth and Fourteenth Amendments.

The protection afforded by the Fourth and Fourteenth Amendments to the United States Constitution, of requiring a determination of the existence of probable cause before a warrant may issue, contemplates the application of often complex rules of law to determine the sufficiency of the facts adduced to support the conclusion which the applicant for the warrant contends should be drawn therefrom. *Jaben v. United States*, 381 U.S. 214 (1965). See also *Wong Sun v. United States*, 371 U.S. 471, 479 (1963).

Perhaps more importantly, such a determination requires the exercise of sufficient independence and authority to grant or refuse requests for warrants to avoid serving "merely as a rubber stamp for the police." *United States v. Ven-*

tresca, 380 U.S. 102, 109, (1965); *Aguilar v. Texas*, 378 U.S. 108, 111 (1964). Such a decision should be clothed with the same immunity as that of a judge performing the same duty. *United States v. Lawrence*, 3 Dall. 42, 1 L.Ed. 502 (1795).

An inspection of the affidavit and warrant reproduced in the appendix (App. 6-7) reveals that the conclusory statement of the officer in this case has been actually and literally reduced to a rubber stamp, imprinted in the blank spaces provided on the printed form affidavit and warrant. The issuance of the warrant by the deputy clerk of court in this case could not have amounted to anything more than the formality of affixing his signature.

The Florida practice revealed by the record in this case is destructive of the constitutional rights declared by this Court in *Gio-denello v. United States*, 357 U.S. 480 (1958), and *Aguilar v. Texas*, 378 U.S. 108 (1964). In *Giordenello*, this Court held that the "neutral and detached magistrate" required by the Fourth Amendment "must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. *He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime.*" 357 U.S. at 486. (Emphasis supplied.) This Court in *Aguilar* held *Giordenello* applicable to the States under the Fourteenth Amendment. 378 U.S. at 112 n. 3. The Florida procedure does not conform with the principles of these cases.*

The total lack of constitutional safeguards against invasion of liberty and privacy by such a procedure becomes all the more apparent, when it is realized that the conclusory statement of the offense charged in this case fully complies with Florida law as pronounced by the Florida Supreme Court in the cases of *Lee v. Van Pelt*, 57 Fla. 94, 48 So.

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*In some communities, police officers are also deputy clerks of court with the power to issue arrest warrants. See *United States v. Melvin*, 258 F.Supp. 252 (S.D. Fla. 1966); *cf. Coolidge v. New Hampshire*, 403 U.S. 443, 452-53 (1971).

632 (1909), and *Williams v. State*, 97 Fla. 401, 121 So. 462 (1929). See also *Foster v. Gilbert*, 264 F.Supp. 209 (S.D. Fla. 1967).

An examination of the decisions of the several State courts, where this question has been raised, reveals that four states (Delaware, Indiana, Minnesota and Wisconsin) have held that the requirements of the Fourth and Fourteenth Amendments prohibit the delegation to a court clerk of the power to determine the existence of probable cause required for the issuance of an arrest warrant. *Caulk v. Municipal Court*, 243 A.2d 707 (Del. 1968); *French v. Superior Court*, 247 N.E.2d 519 (Ind. 1969); *State v. Simpson*, 28 Wisc. 2d 590, 137 N.W.2d 391 (1965) and *State v. Paulick*, 277 Minn. 40, 151 N.W.2d 591 (1967). While Alabama and North Carolina have held that delegation of that function to court clerks did not violate the separation of powers clause contained in their state constitutions in the cases of *Kruelhaus v. Birmingham*, 164 Ala. 623, 51 So. 297 (1909), and *State v. Furmage*, 250 N.C. 616, 109 S.E.2d 563 (1959), later decisions of those Courts indicate that a different result might have been reached upon a consideration of Fourth and Fourteenth Amendment issues. *Miller v. Birmingham*, 218 So.2d 281 (Ala. 1969); *State v. Matthews*, 270 N.C. 35, 153 S.E.2d 791 (1967). Although West Virginia has held that arrest warrants may be issued by a police lieutenant, the requirements of the Fourth and Fourteenth Amendments were not dealt with by that state's highest court in *State v. Thompson*, 151 W.Va. 336, 151 S.E.2d 870 (1966). The only states which have held that a clerk of court is not prohibited by the Fourth and Fourteenth Amendments to the United States Constitution from making the determination of existence of probable cause required for the issuance of an arrest warrant, are Florida, in the decision appealed from, and New Jersey, in *State v. Ruotola*, 52 N.J. 508, 247 A.2d 1, (1968).

Unquestionably, it is more convenient to police officers to be able to obtain arrest warrants from clerical personnel

of the city, than to obtain an audience before one of the City's Municipal Court Judges and submit for judicial determination the information believed to constitute probable cause. The convenience, however, is hardly the type of compelling governmental interest that justifies an invasion of the constitutionally protected liberty of private citizens. In the absence of a showing of a compelling need for pre-trial arrest and detention, there is no valid reason why jurisdiction over the person of a citizen charged with the violation of a municipal ordinance cannot be obtained by service of a summons. If, on the other hand, it is contended by the police that arrest and pre-trial detention are necessary, although adequate grounds for arrest without a warrant do not exist, then that decision can only be made by one possessing the independent discretion of a judicial officer.

CONCLUSION

The judgment in this case should be reversed and remanded to the Supreme Court of Florida for further proceedings not inconsistent with the opinion of this Court.

Respectfully submitted,

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